IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 1314

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

DOUGLAS DARRELL CARLSON,

Defendant and Petitioner.

PETITION FOR WRIT OF CERTIORARI.

ROBERT WILLIAM STANLEY,
DEAN R. PIC'L,
DAVID V. KENYON,
3440 Wilshire Boulevard,
Los Angeles 5, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Opinions of the courts below 1

Statement of the grounds on which the jurisdiction of this court is invoked 2

Questions presented for review 3

Constitutional provisions and statute which the case involves 3

Statement of case 4

Stage of the proceedings in the court of first instance and in the Appellate Court at which and the manner in which the federal question sought to be reviewed was raised 7

Arguments amplifying reasons relied on for allowance of the writ 8

Appendices:

Appendix I. Opinion of the District Court of Appeal ..... App. p. 1

Appendix II. Order Denying Hearing After Judgment by District Court of Appeal, 4th District ..... App. p. 9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149	9
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527	9
Reese v. State of Georgia, 76 S. Ct. 167, 350 U. S. 85, 100 L. Ed. 77, rehear. den. 76 S. Ct. 297, 350 U. S. 943, 100 L. Ed. 823	9

STATUTES	
California Health and Safety Code, Sec. 11530	4
California Health and Safety Code, Sec. 11531	4
California Health and Safety Code, Sec. 11556	4
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, Fourteenth Amendment	2, 8, 10
United States Constitution, Fourteenth Amendment, Sec. 1	3

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OCTOBER TERM 1961

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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vs.

DOUGLAS DARRELL CARLYON,

Defendant and Petitioner.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of Douglas Darrell Carlyon for a writ of certiorari to review a judgment of the District Court of Appeal, Fourth Appellate District, State of California, made and entered by said court on the twenty-sixth day of April, 1961, a copy of which is hereto appended, respectfully shows to this honorable court:

Opinions of the Courts Below.

No opinion was rendered by the trial court.

The opinion of the District Court of Appeal, Fourth Appellate District, State of California, has been re-

ported officially at 191 A. C. A. 643 and unofficially at 12 Cal. Rep. 813. A copy of the opinion rendered by said court is annexed to this petition as Appendix I.

No opinion was rendered by the Supreme Court of California. Hearing on appeal was denied. A copy of Order Denying Hearing after Judgment by District Court of Appeal is annexed to this petition as Appendix II.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

The date of the judgment sought to be reviewed and the date of its entry are the twenty-sixth day of April, 1961. On appeal to the Supreme Court of the State of California an order denying hearing was filed the twenty-first day of June, 1961.

There was no order respecting a rehearing and there was no order granting an extension of time within which to petition for certiorari.

The case is one involving adequate representation by counsel in a criminal case within the provisions of the Constitution of the United States, Amendment 14, denying the right of a state to "deprive any person of life, liberty, or property, without due process of law."

The statutory provision believed to confer jurisdiction upon the court to review the judgment of the court below is United States Code, Title 28, Section 1257(3).

Questions Presented for Review.

Where counsel for defendant in a criminal matter fails to prepare for trial prior to three days before trial was to commence and attempts to induce defendant to testify as to matters that were false, and where counsel for the defendant is subject to a conflict of interests and counsel for the defendant fails to try the case in a manner commensurate with the defendant's statement of facts, and where defendant attempts to rectify the situation as soon as its force and effect became apparent to him and the refusal of the trial court to provide reasonable means for such rectification, does such effectively constitute a denial of counsel so as to deny defendant due process of the law?

Constitutional Provisions and Statute Which the Case Involves.

Amendment 14, Section 1, of the United States Constitution provides the following rights and protections against action of a state:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added.)

Statement of Case.

Because of the nature of the question presented by this petition, and the fact that Douglas Darrell Carlyon was represented at the time of trial by Attorney Eugene McKnight, and on the motion for new trial and on appeal by Attorney Dean R. Pic'l, Mr. McKnight throughout this petition shall be referred to as counsel for the defendant and Mr. Pic'l as counsel for the petitioner.

In Case No. 9233 defendant was originally charged with one violation of California Section 11530 of the Health and Safety Code, to wit: possession of marijuana; one violation of Section 11556 of the California Health and Safety Code, to wit: conspiracy to commit the crime of being in a room where a narcotic was being unlawfully smoked and used; and one violation of Section 11531 of the California Health and Safety Code, to wit: furnishing of marijuana. Counts one and two were also charged against two codefendants, Carol Jean Warren and Donald Jackie Morgan. Prior to the commencement of the trial, count one was dismissed as to the codefendant, Carol Jean Warren, and count two was dismissed as to the defendant and both codefendants. The original count three charged against the defendant was thereafter referred to as count two.

In this petition Douglas Darrell Carlyon shall be referred to as either the defendant or petitioner and Donald Jackie Morgan as the codefendant.

On Monday, July 18, 1960, trial commenced before a jury, in Department 3 of the Superior Court of the State of California in and for the County of Kern, the Honorable Gordon L. Howden, judge presiding. Both the morning session on that day and a portion of the

afternoon session were devoted to enpaneling a jury; thereafter counsel for the people presented his opening statement and the first witness was called.

On Monday evening, counsel for the petitioner received a phone call at his home in Los Angeles, California, from the mother of the defendant. At that time grave concern was expressed by the mother over the conduct of the trial and it was alleged that counsel for the defendant, who also represented the codefendant, was faced with a conflict of interest and was more concerned in gaining an acquittal for the codefendant for the purposes of protecting a civil claim against Kern County than he was interested in attempting to obtain an acquittal for the defendant. Counsel for the petitioner was requested to be in Bakersfield Tuesday morning to advise the defendant and his family as to the appropriate course of action. Counsel for the petitioner journeyed to Bakersfield, observed the trial during the morning session on Tuesday, July 19, 1960, then conferred at considerable length with the defendant and his family.

In the afternoon of that day counsel for the petitioner spoke with Judge Main of the Superior Court of the State of California in and for the County of Kern and at that time made a statement to a court reporter. A copy of that statement was subsequently delivered by Judge Main to Judge Howden and the original was incorporated by reference into counsel for the petitioner's argument on the motion for new trial.

On Wednesday, July 20, 1960, counsel for the petitioner requested permission to speak to Judge Howden in the presence of counsel for the defendant, counsel for the people, the defendant and codefendant. At

that time the allegations contained in the statement made on Tuesday to the reporter in the chambers of Judge Main were discussed by all persons present. Counsel for the defendant requested permission to be relieved. Consideration was then given to the length of continuance which might be possible so as to permit counsel for the petitioner to prepare himself to undertake the defense. Counsel for the petitioner, after stating his position relative to undertaking the defense of the case at that stage of the proceedings, requested the declaration of a mistrial and resetting the case on a subsequent date for trial *de novo*. After discussion and consideration, Judge Howden refused to declare a mistrial and denied the request of counsel for the defendant to be relieved. The case was then continued to the afternoon session to proceed as originally commenced.

Neither the defendant nor the codefendant, Donald Jackie Morgan, took the stand to testify in their own behalf. The defendant was subsequently found guilty as to both counts one and two and the jury, being unable to reach a verdict on count one as to the codefendant Morgan, was discharged after a mistrial had been declared.

Defendant was then committed to custody pending the hearing on his application for probation and counsel for the defendant was relieved.

On August 12, 1960, counsel for the petitioner moved for a new trial on the grounds of insufficiency of the evidence and misconduct of counsel for the defendant at the trial. The motion was at that time argued by counsel for the petitioner. Because of the fact that Mr. Fred Owen, Deputy District Attorney, who had represented the people at the trial, was not present, the

people then being represented by Mr. Oliver Rostain, Deputy District Attorney, the matter was continued until August 29, 1960, to permit argument by Mr. Owen.

On August 29, 1960, following argument by the people, defendant's motion for a new trial was denied; defendant's request for probation was denied and defendant was sentenced to the State Penitentiary for the term prescribed by law on both counts one and two, said sentences to run concurrently.

Defendant appealed to the District Court of Appeal, Fourth Appellate District, State of California, and that court affirmed the judgment and order of the lower court in an opinion attached hereto as Appendix I. Defendant's petition for a hearing in the Supreme Court of the State of California was denied, which petition is attached hereto as Appendix II.

Stage of the Proceedings in the Court of First Instance and in the Appellate Court at Which and the Manner in Which the Federal Question Sought to Be Reviewed Was Raised.

The federal question was raised in the court of first instance, the Superior Court of the State of California in and for the County of Kern, when the matter was called to the attention of the presiding judge of the criminal department of the court in a statement made by counsel for the petitioner to a reporter in the chambers of Judge Main [Supplemental Clerk's Transcript] and incorporated by reference into the argument of counsel for petitioner on the motion for new trial and ordered by the court to be filed [Rep. Tr. Supp. Vol. p. 19, lines 13-20] in the chambers of the trial judge

[Rep. Tr. p. 207, line 1, through p. 223, line 6]. Judgment was rendered against defendant and said motion for new trial was denied by the court of first instance.

Upon appeal to the District Court of Appeal, Fourth Appellate District, State of California, defendant in his brief and on oral argument argued that the judgment of the court below was incorrect for the reasons set forth in the statement made in Judge Main's chambers which were incorporated by reference into defendant's motion for new trial and set forth in the statements made in the chambers of the trial judge. The District Court of Appeal affirmed the judgment of the court of first instance (Appendix I).

Upon appeal to the Supreme Court of California defendant in his brief set forth the issues raised in the trial court and District Court of Appeal, Fourth Appellate District, State of California.

Arguments Amplifying Reasons Relied on for Allowance of the Writ.

Petitioner respectfully submits that this case presents an important issue as far as your petitioner is concerned in that a term in the State Penitentiary for your petitioner is contingent upon it. More importantly, however, as to the consideration of whether this court should grant a petition for a writ of certiorari lies the question of whether petitioner has been denied the right of aid by counsel and of a fair trial to the extent or in such degree that petitioner has not received due process of law guaranteed by the Fourteenth Amendment of the United States Constitution.

The question of whether or not a defendant has been deprived of due process of law under the Fourteenth

Amendment of the United States Constitution has been determined on the basis of whether "the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (*Herbert v. Louisiana*, 272 U. S. 312, 316)," (*Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527 (1932), or as stated in *Palko v. Connecticut*, 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149 (1937)), the test is whether or not the process under which the defendant was tried and convicted violated the "very essence of a scheme of ordered liberty." Effective assistance of a counsel in a State Court of prosecution has been held to be a constitutional requirement of due process, (*Reese v. State of Georgia*, 76 S. Ct. 167, 350 U. S. 85, 100 L. Ed. 77, rehearing denied, 76 S. Ct. 297, 350 U. S. 943, 100 L. Ed. 823 (1955).)

Counsel for the defendant treated the cause of petitioner in such a cavalier manner as not to commence preparation for trial until three days before trial was to begin. During and prior to trial, counsel for the defendant attempted to persuade petitioner to testify as to matters that were false. This same counsel also represented codefendant Donald Jackie Morgan at the trial, the same Donald Jackie Morgan for whom counsel for defendant had filed a civil claim against the County of Kern, which claim we felt would be protected by gaining an acquittal for codefendant Morgan. Counsel for the defendant failed to try the case on the basis of the facts as stated by the petitioner but proceeded on the theory of entrapment which the petitioner as soon as this became clear to him attempted to rectify. The

trial court, however, refused to allow petitioner sufficient and reasonable means for such rectification.

Petitioner respectfully submits that the conglomerate or sum total of the facts which petitioner cites as error occurring at the trial level of the proceedings denied petitioner effective assistance of counsel. Standing alone, each of these facts may not be sufficient to have constituted a denial of due process under the Fourteenth Amendment. However, together, as in the biblical tale of the bundle of fagots, they gained strength and import and in their totality have effectively denied that due process of law which a state must honor.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of California, to the end that the judgment of the District Court of Appeal, Fourth Appellate District, State of California, may be reviewed and reversed by this Honorable Court.

DOUGLAS DARRELL CARYLON,
Petitioner,

By ROBERT WILLIAM STANLEY,
DEAN R. PIC'L,
DAVID V. KENYON,
Counsel for Petitioner.

APPENDIX I.

Opinion of the District Court of Appeal.

In the District Court of Appeal, Fourth Appellate District, State of California.

The People of the State of California, Plaintiff and Respondent v. Douglas Darrell Carlyon, Defendant and Appellant. 4 Crim. No. 1291.

Filed Apr. 20, 1961.

Appeal from a judgment and order of the Superior Court of Kern County denying a motion for new trial. Gordon L. Howden, Judge. Affirmed.

Dean R. Pic'l for Appellant.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, and Jack K. Weber, Deputy Attorney General, for Respondent.

Defendant Carlyon appeals from a judgment of conviction, after jury trial, of violations of Health and Safety Code, section 11530 (possession of marijuana) and section 11531 (furnishing and giving away marijuana) and from the order denying a motion for a new trial.

On February 3, 1960, Mrs. Petty, an undercover investigator for the sheriff's office, had a conversation with Carlyon. He told her that he was going to Los Angeles that day and she asked him if he would bring her "something" from Los Angeles. Carlyon's response was, "I don't have to bring it back. I got the grass right on me." Later that day, before his departure for Los Angeles, Mrs. Petty met Carlyon at an apartment which he had apparently been using.

where he gave her 14 marijuana cigarettes which she later turned over to a sheriff's sergeant. On the following Saturday, February 6, Carlyon invited Mrs. Petty to a party at his apartment that night. She attended, carrying a radio transmitter concealed in her purse. Donald Morgan, Mrs. Warren and Carlyon were there when she arrived. They listened to records, and after a while Carlyon produced some marijuana cigarettes and gave one to each of the persons in the room. Donald Morgan was somewhat ill and smoked very little, if any, of his cigarette. The other three persons lighted several marijuana cigarettes and passed them back and forth among them. Mrs. Petty only pretended to smoke the cigarette which had been given to her. Meanwhile, Sergeant Dodd and three deputy sheriffs waited outside the apartment listening to the conversation therein on their radio apparatus and recording it. After Mrs. Petty gave a prearranged signal indicating that narcotics were being used inside the apartment, the officers entered. A search revealed a partially burned marijuana cigarette on the speaker screen of a record player near the place where Carlyon was sitting when the officers entered. Another partially burned marijuana cigarette was found in a vial on the day bed upon which Donald Morgan had been lying. A bottle and a can containing marijuana debris were found in the yard at the rear of the apartment.

Neither appellant nor his codefendant Morgan testified and no substantial evidence was presented by the defense. The jury verdict found appellant guilty as to both counts but was unable to agree as to the guilt of Morgan who was charged with possession of marijuana.

Appellant's only contention on this appeal is that he was denied his constitutional right to counsel at the trial.

At the initial arraignment on March 17, 1960, appellant and his codefendant Morgan were represented by the attorney (hereinafter referred to as "trial attorney") who continued to represent them at all subsequent proceedings until the conclusion of the trial. His trial attorney had previously represented the appellant at his preliminary hearing. The record indicates that appellant was arrested on February 6, 1960, released on bail on March 1, 1960, and remanded to custody at the conclusion of his trial on July 21, 1960. A motion to dismiss the information under Penal Code, section 995, was denied; not-guilty pleas were entered and the trial was set for May 3, 1960. Subsequently, at appellant's request, the trial date was continued until June 13, 1960, and again to July 18, 1960. On the latter date, the trial began, a jury was selected, an opening statement was made by the prosecution, and the prosecution began presenting its case to the jury. At the conclusion of the first day of trial, the prosecution had completed its direct examination of the first witness, Mrs. Petty, and the defense had not yet begun cross-examination. Appellant's trial attorney then requested a transcript of part of Mrs. Petty's direct examination and this request was granted.

According to subsequent statements of appellant's counsel on appeal, during the evening following the first day of trial, he was contacted by appellant and his family and asked to advise them concerning the defense of appellant's trial. Apparently they were dissatisfied with the manner in which appellant's trial at-

torney was conducting the defense. According to his statement to the trial court, appellate counsel traveled to Bakersfield on the following morning. During that day he did not communicate with appellant's trial attorney or the judge who was conducting the trial, although he did observe a part of the proceedings as a spectator. Thereafter appellate counsel sought advice from the presiding judge of the criminal department of the Superior Court of Kern County.

But it was not until the next morning, the third day of the trial, that appellate counsel informed the trial judge and appellant's trial attorney of appellant's dissatisfaction with the conduct of his defense. As then stated by appellate counsel, the causes of this dissatisfaction were twofold: first, that appellant and his trial attorney were unable to agree as to whether the defense should proceed upon the theory of entrapment or upon the theory that the defendant had not committed the offenses charged; secondly, that there was a conflict of interest between the appellant and his codefendant Morgan making it impossible for the same attorney to represent both defendants. It was alleged that the trial attorney represented Morgan in a civil suit and that he was conducting the defense so as to protect the personal injury suit, at appellant's expense. The trial attorney vigorously denied the latter allegation, stating that although he had filed a claim against the county on Morgan's behalf, he had not been retained to represent Morgan in a personal injury action. He further stated that he had filed this claim at the request of appellant's mother with Morgan's consent. On this appeal, it is not contended that appellant's interests were sacrificed in order to protect Morgan's supposed action for personal injuries.

In response to the contention that appellant and his trial attorney could not agree as to the defense to be presented, the trial attorney stated generally that this was true and that the cause of the disagreement was that appellant's family vacillated from one defense to another. He also observed that the situation was hampering his defense of Morgan and asked to be relieved of appellant's defense and allowed to continue as attorney for Morgan. It was pointed out that the prosecution had almost completed presenting its case. The court then suggested that it was disposed to permit appellant to substitute attorneys, allow the prosecution to complete its case, and grant a continuance of four days until the following Monday, at which time the defense would commence presenting evidence. Appellate counsel stated that he was free for the intervening time and could devote his entire attention to the preparation of a defense, but said that he did not feel that he could enter the case in the middle of the trial and adequately protect appellant's interests. He asked that a mistrial be declared as to appellant and that the case be reset for another time, preferably at least three weeks later. The trial court refused to grant a mistrial and, in view of appellate counsel's refusal to undertake appellant's defense on the terms previously offered by the court, ordered the trial to continue.

At the outset of the defendants' case-in-chief, a conference was held in chambers in the presence of the judge, counsel and the defendants. Defendants' trial attorney pointed out that it was difficult for him to advise the defendants as to whether they should take the stand because their testimony might be conflicting. The court then advised the defendants that they could testify if they desired to do so, but that they were

not required to do so. It was pointed out that if they did take the witness stand they could be cross-examined, and that if they did not take the witness stand the prosecutor could comment upon that fact in his argument to the jury, and the court might instruct the jury as to the "effect" of their failure to take the witness stand.

Appellant contends that the conduct of his trial attorney virtually amounted to a denial of counsel, in that the attorney actually based the defense on the theory of entrapment, whereas the appellant preferred to deny that he had committed the offense charged. It is also contended that appellant took all reasonable steps to bring his dissatisfaction with trial counsel to the attention of the court and that he was denied an adequate opportunity to correct his dissatisfaction with counsel.

These contentions are without merit. "The right to the assistance of counsel guaranteed by the constitutional and statutory provisions, like any other legal right, may be invoked only in the course of orderly procedure." (*In re* Connor, 16 Cal. 2d 701, 709.) Appellant personally selected and employed his trial attorney. Appellant does not explain why he did not discuss his possible defenses with his attorney before his trial. This would seem to be one of the first subjects which a client would discuss with his attorney.

Appellant's trial attorney represented him at the preliminary hearing and at several proceedings in the superior court prior to the commencement of the trial. Appellant was released on bail over four months before the trial began and was therefore free to personally see to the preparation of his defense and consult with

other attorneys of his own choosing if the attorney he had previously selected was unsatisfactory to him for any reason. Appellant attempts to explain the failure to settle this alleged disagreement between himself and his counsel before the trial by saying that he was "led" into the defense of entrapment despite the fact that he had not committed the crime. More convincing is the statement of the trial attorney that appellant vacillated from one defense to another. But even if appellant's version is accepted, it would not follow that he was deprived of his constitutional right to counsel. Reliance on bad advice of retained counsel is not enough to vitiate a plea of guilty entered in reliance thereon. (People v. Martinez, 88 Cal. App. 2d 707; People v. Grgurevich, 153 Cal. App. 2d 806.) The same rule has been applied where defendants failed to take the stand or made a choice of defenses relying upon the advice of their attorneys. A defendant may not claim error because his attorney exercised his own judgment and rejected the suggestions of the defendant during the trial. (People v. Logan, 137 Cal. App. 2d 331.)

"One who has had representation by counsel of his own choice and an unhampered opportunity to prepare and present his defense has not be deprived of his constitutional right to the aid of counsel." (People v. Morton, 100 Cal. App. 2d 269, 271.)

Appellant complains that the conduct of his trial attorney was such that he was virtually denied the right to counsel. We are convinced that such was not the case. Although appellant contends that People v. Davis, 48 Cal. 2d 241, applies, we are convinced that the facts of that case can be readily distinguished from

the facts of the instant case. In that case, counsel was afflicted with a mental illness and his actions were unusual and explainable only on the basis that his illness affected his handling of the case. In People v. Gaither, 173 Cal. App. 2d 662, 670-671, involving a situation analogous to the instant case, it was held that the trial court properly refused to grant a mistrial because the defendant desired to retain other counsel. The court there said:

"As a rule an accused has a right to represent himself or to representation by an attorney of his own choice. (Citing cases.) However, the right is one that must be exercised seasonably and not through mere caprice. The application we are considering could not have been granted without an unwarranted disruption of the trial."

It has been held that, under circumstances similar to those here presented, it is not necessary to grant a continuance to enable newly proferred counsel to acquaint himself with the case and assume the defense. (People v. Gaither, *supra;* People v. Shaw, 46 Cal. App. 2d 768; People v. Simeone, 132 Cal. App. 2d 593.) Here, the court, probably to protect the codefendant Morgan's interests in an unfortunate situation not of his making, offered such a continuance to appellant. He refused it and cannot now claim that his request to substitute counsel was refused. Nor does the record show that the trial attorney's handling of the case was unskillful. He moved to dismiss the information under Penal Code, section 995, and made objections to the introduction of evidence. His cross-examinations of the witnesses presented were thorough and perceptive. The final argument made for the defense was

not merely adequate but of an exceptional quality. We are convinced that appellant's defense was not hindered by the ability or actions of his trial attorney. It is apparent that appellant himself decided not to testify on his own behalf. He cannot now complain that this decision was unwise.

The motion for a new trial was properly denied. No sufficient grounds for granting the motion were presented. (People v. Logan, *supra,* 137 Cal. App. 2d 331.)

The judgment and order are affirmed.

Griffin, *P. J.*

We concur:

Shepard, *J.*

Coughlin, *J.*

APPENDIX II.

Order Denying Hearing After Judgment by District Court of Appeal, 4th District.

In the Supreme Court of the State of California In Bank.

People v. Carlyon. Crim. No. 1291.

Filed June 21, 1961.

Appellant's petition for hearing DENIED.

GIBSON, *Chief Justice.*